UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERP Analysts, Inc., 425 Metro Place North, Suite 510 Dublin, Ohio 43017 Plaintiff, v. L. Francis Cissna, Director, United States Citizenship and Immigration Services, 20 Massachusetts Avenue, NW, Washington, D.C. 20529 Defendant.	C/A No.: 1:19-cv-294

COMPLAINT

As part of its 2017 Buy American, Hire American policy, the Defendant seeks to eliminate information technology consulting companies that utilize foreign labor under 8 U.S.C. § 1101(a)(15)(H). Its strategy to do so is simple. Through informal adjudications (and significant delays thereof), USCIS is creating new rules, ignoring evidence, and acting beyond its competence to deny all such petitions. For the reasons below, this Court should set aside the visa denial in this case and order the Defendant to re-adjudicate the petition in compliance with the law within 15 calendar days.

PARTIES

1. Plaintiff ERP Analysts, Inc. ("Plaintiff") is a corporation under the laws of Ohio and it is headquartered in Dublin, Ohio. Plaintiff is an information technology consulting company that provides information technology services to its clients from its headquarters or by placing its employees at the client's location.

2. Defendant L. Francis Cissna is the Director of United States Citizenship and Immigration Services. He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H). Director Cissna and United States Citizenship and Immigration Services ("USCIS") are headquartered and "reside" in the District of Columbia.

VENUE AND JURISDICTION

3. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

4. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA"). Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

5. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

6. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because USCIS resides in the District of Columbia.

7. No statute or regulation requires an administrative appeal in this case. Thus, Plaintiff has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

8. USCIS's denial of Plaintiff's Form I129, Petition for Nonimmigrant Worker is a final agency action.

FACTS

H1B Visa Program

9. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

10. Generally, specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

11. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa").

12. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

13. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

14. The employer then signs the approved Labor Condition Application and agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the Labor Condition Application is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

15. After receiving an approved Labor Condition Application and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

16. USCIS's then reviews the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

17. Upon approval of the H1B Visa application, the employee may work for up to three years for the petitioning employer in the particular specialty occupation. 8 U.S.C. § 1184(g).

Employer Employee Determination

18. Consistent with the Buy American Hire American Executive Order, recently, USCIS has started to deny H1B Visas because the petitioning employer—primarily information technology consulting companies—do not have an employer employee relationship with the foreign national worker.

19. USCIS's "Employer/Employee Rule" appears to be based on the following rationale: The employer petitioning for the H1B Visa does not have an employer/employee relationship with the foreign national employee because the employer will place the foreign national employee off-site at a third-party company and that third-party company, not the petitioning employer, will have control over the employee. Without control over the employee's every action, the petitioning employer cannot show an employer/employee relationship and, therefore, is not entitled to an H1B Visa.

20. This rule, however, fails to recognize that the DOL is the only agency authorized to make such a finding and it has expressly rejected this rationale because the statutes clearly delineate DOL and USCIS's separate roles in the H1B Visa process. In fact, DOL—not USCIS—has engaged in multiple rounds of notice and comment rulemaking and considered the question of whether consulting, staffing, or job contractors are proper "employers" under the H-1B program. 56 Fed. Reg. 54720-54739, October 22, 1991; 57 Fed. Reg. 1316-1338, January 13, 1992; 59 FR 65646, December 20, 1994.

21. Each time, DOL has determined that information technology consulting companies are employers even if they place all its employees at off-site locations for third-party companies. *Id.*

22. DOL's authority to determine whether a company is an employer for purposes of an H1B Visa is located in 8 U.S.C. §§ 1182(n) & (p).

23. DOL may not issue an approved Labor Condition Application to anyone other than an "employer." *See* 8 U.S.C. § 1182(n)(1)(A).

24. Neither § 1182(n) nor any other statute gives USCIS authority, joint with DOL or individually, to address this question or to disagree with DOL's determination.

25. USCIS's whole reliance on DOL for this determination can even be found in USCIS's interpretation of the controlling statutes manifested in their regulations.

26. USCIS has a definition of "employer" in its regulation. 8 C.F.R. § 214.2(h)(4)(ii) but it was copied, verbatim, from DOL's regulation that was designed to explicitly allow consulting, staffing, and job contracting companies. 20 C.F.R. § 655.715 (1991-1997), 56 Fed. Reg. 54720-54739 (Interim Rule).[1]

27. In light of the DOL's exclusive statutory and regulatory authority over the determination of who is an H1B employer and USCIS's prior recognition of such exclusive authority, USCIS's current Employer/Employee Rule is unlawful.

Specific, Non-Speculative Work Rule

28. USCIS created two separate tiers of H-1B employers, and dictated two different sets of rights, responsibilities, and evidentiary burdens for each tier.

29. The first tier is comprised of employers whose business model limits employees to working in the employer's office space, directly for their employer. The second tier, and the employers impacted by the new rules, comprises information technology consulting companies whose employees are often required to work on projects at a third-party client's worksite.

[1] It cannot be disputed that the rulemaking where USCIS adopted DOL's definition of employer was for the limited purpose of explaining that H1B employer petitioners must have a physical location in the United States. 56 Fed. Reg. 61111-61121, December 2, 1991 ("In order to provide clarification, the Service has included a definition of the term "United States employer" in the final rule").

30. For information technology consulting companies to qualify as employers and receive an H-1B visa, USCIS demands they provide evidence that the employee will be fully employed with specific and non-speculative work assignments for the entire duration of the H-1B visa's validity period. This requirement does not apply to other employers.

31. While the parameters of USCIS's "Specific, Non-Speculative Work Rule" are unclear, it is clear that, if the employer cannot show consistent work for an employee for the next three years, regardless of the nature and details of such work, it cannot satisfy USCIS's Specific, Non-Speculative Work Rule.

32. But the statutory scheme rejects a requirement that the employer provide proof of specific or non-speculative work assignments for the *entirety of the duration* of the visa validity period. 8 U.S.C. § 1182(n)(2)(C)(vii).

33. In fact, § 1182(n)(2)(C)(vii) expressly allows employers to hire a foreign national with an H1B Visa and place them in a "non-productive status" (which is defined as not having enough work to perform) provided the employer continues to pay the wages required on the LCA. *Id.*

34. Importantly, congress authorized DOL, not USCIS, to oversee these worker-protection provisions through enforcement actions to compel compliance or remedy violations of the employer's attestations on the Labor Condition Application.

35. As mentioned above, an employer submits a Labor Condition Application, DOL approves it, and the employer signs it. At that moment, the employer has agreed to employ the beneficiary for the duration of the period approved—three years for most H1B Visa applications—in compliance with the terms of the Labor Condition Application. The terms of the Labor Condition Application include paying a prevailing wage during any periods of non-productive status.

36. Congress and DOL, therefore, ensure an employer will employ an employee in a specialty occupation for three years by requiring the employer to pay the worker the wage associated with the specialty occupation for the entirety of the three-year period. Congress did not require an employer to identify specific, non-speculative work duties for three years.

37. USCIS's Specific, Non-Speculative Work Rule defies this paradigm.

38. First, nothing in 8 U.S.C. § 1184(i) indicates that Congress intended to delegate this authority to USCIS. USCIS seemingly recognizes this by trying to shoehorn its Specific, Non-Speculative Work Rule into its analysis of whether a particular position is a specialty occupation.

39. Second, USCIS tacitly recognized that a Specific, Non-Speculative Work Rule is a legislative rule, requiring notice and comment rulemaking, because it issued a notice of proposed rulemaking to enact a similar rule in 1998. *See* Proposed Rule, *Petitioning Requirements for H Nonimmigrant Classification*, 63 Fed. Reg. 30419 (June 4, 1998).

40. In the Proposed Rule USCIS proposed prohibiting hiring "temporary foreign workers to meet possible workforce needs arising from *potential business expansions or the expectation of potential new customers or contracts*." *Id.* But even under such proposed rule, USCIS would only consider whether there was work available when the petition was initially filed. *Id.* Thus, even though the proposed rule sought to preclude speculative work, it did not go nearly as far as requiring specific and non-speculative work assignments for the entire three-year duration of the visa validity period. *See id.*

41. However, on October 21, 1998, before USCIS could conclude notice and comment on this proposed rule, congress passed and the President signed the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV, Pub.L. 105-277 (October 21, 1998). ACWIA contained the "non-productive status" provision, allowing gaps in employment for H1B

Visa holders but requiring H1B Visa employer to pay those workers during any such non-productive status. *See* 8 U.S.C. § 1182(n)(2)(C)(vii).

42. It is no surprise USCIS abandoned its rulemaking; Congress explicitly rejected it. Curiously, USCIS's Administrative Appeals Office continues to cite to this abandoned rulemaking as controlling legal authority to justify its demands that consulting and staffing companies provide evidence of guaranteed specific and non-speculative work assignments for the entire three years of an H-1B Visa.

43. USCIS's Specific, Non-Speculative Work Rule seeks to go further than its 1998 proposed rule and it directly conflicts with § 1182(n)(2)(C)(vii). It is therefore unlawful.

Plaintiff's Petition and Denial

44. Plaintiff filed an H1B Visa Application on behalf of Beneficiary Smitha Kukkadapu on September 4, 2018.

45. USCIS denied the Plaintiff's H1B Visa Application petition on December 7, 2018 based on its Employer/Employee Rule and the Specific, Non-Speculative Work Rule.

46. No administrative appeal is required to challenge the denial of an H1B Visa Application.

47. This complaint followed.

FIRST CAUSE OF ACTION
(APA - Employer/Employee Rule)

48. Plaintiff re-alleges all allegations above as though restated here.

49. USCIS's denial is a final agency action that aggrieved Plaintiff. 5 U.S.C. § 704.

50. USCIS's denial is based on its Employer/Employee Rule.

51. USCIS's denial violates the APA because its basis—the Employer/Employee Rule—is *ultra vires* and, therefore, it is in excess of statutory jurisdiction, authority or limit. 5 U.S.C. § 707(2)(C).

52. USCIS's denial violates the APA because its basis—the Employer/Employee Rule—constitutes a legislative rule that did not go through notice and comment rulemaking and, therefore, the denial is without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

53. USCIS's denial violates the APA because its basis—the Employer/Employee Rule—is arbitrary and capricious as it contradicts DOL's employer finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

54. USCIS's denial violates the APA because its basis—the Employer/Employee Rule—is arbitrary and capricious as the Plaintiff provided sufficient evidence in its H1B Visa application to prove an employer/employee relationship and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

55. USCIS's denial violates the APA because its basis—the Employer/Employee Rule—violates the Plaintiff's freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

56. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

57. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, and instruct it to re-adjudicate the H1B Visa application without applying the Employer/Employee Rule.

SECOND CAUSE OF ACTION
(APA - Specific, Non-Speculative Work Rule)

58. Plaintiff re-alleges all allegations above as though restated here.

59. USCIS's denial is a final agency action that aggrieved Plaintiff. 5 U.S.C. § 704.

60. USCIS's denial is based on its Specific, Non-Speculative Work Rule.

61. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is *ultra vires* and, therefore, it is in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 707(2)(C).

62. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule—constitutes a legislative rule that did not go through notice and comment rulemaking and, therefore, the denial is without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

63. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is arbitrary and capricious as it contradicts § 1182(n)(2)(C)(vii) and DOL's approval of the Labor Condition Application finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

64. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is arbitrary and capricious as the Plaintiff provided sufficient evidence in its H1B Visa application to prove specific, non-speculative work and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

65. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —violates the Plaintiff's freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

66. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

67. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, and instruct it to re-adjudicate the H1B Visa application without applying the Specific, Non-Speculative Work Rule.

PRAYER FOR RELIEF

Plaintiff, therefore, prays that this Court enter the following relief:

68. Take jurisdiction over this case;

69. Declare USCIS's Employer Employee Rule unlawful;

70. Declare USCIS's Specific, Non-Speculative Work Rule unlawful;

71. Declare USCIS's denial in this case violative of the Administrative Procedure Act;

72. Remand this case to USCIS with instructions to re-adjudicate the case without applying the Employer Employee Rule or the Specific, Non-Speculative Work Rule within 15 calendar days;

73. Grant all relief that is necessary and proper; and

74. Award attorneys' fees and costs under the Equal Access to Justice Act.

February 5, 2019

Respectfully Submitted,

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